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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

File

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In re Application of	)	
	)	
BENCHMARK COMMUNICATIONS CORPORATION	)	File No. BPH-891228MT
	)	
For Construction Permit for a New	)	
FM Station to Operate on Channel 291C3	)	
in Chatom, Alabama	)	

TO: Roy J. Stewart, Chief
Mass Media Bureau

REPLY TO OPPOSITION TO PETITION TO DENY

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MAY 14 1991
FM EXAMINERS

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May 13, 1991

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SUMMARY

Far from resolving the many questions which were already pending before the Commission about its qualifications (and particularly about apparent misrepresentations it had made to the Commission), Benchmark Communications Corporation ("Benchmark"), in its Opposition to Hap-Hazard Broadcasting's Petition to Deny, has dug itself in even deeper. Not only does Benchmark not resolve those earlier questions, it effectively concedes that those questions can and should be resolved ***against*** Benchmark. Moreover, Benchmark's Opposition further demonstrates that representations contained in Benchmark's current application (to which Hap-Hazard's Petition is directed) are similarly false and misleading.

No salutary purpose is served by allowing the likes of Benchmark to delay for a period of years (in Benchmark's case, already at least six years) the initiation of local service. This is especially true where the available evidence, the vast majority of which has been provided by Benchmark itself in its various self-contradictions, demonstrates that Benchmark cannot be relied upon in any respect.

1. Charles Esposito d/b/a Hap-Hazard Broadcasting ("Hap-Hazard") hereby replies to the Opposition of Benchmark Communications Corporation ("Benchmark") to Hap-Hazard's Petition to Deny filed in connection with the above-captioned application. [1/] As set forth below, Benchmark's Opposition does nothing to address the serious questions which clearly exist with respect to Benchmark's application; indeed, to the contrary, its Opposition in many respects aggravates those questions.

2. As a threshold matter Benchmark challenges Hap-Hazard's standing to file a petition to deny. The single authority cited (without explanation) in support of that proposition by Benchmark is *Amherst Broadcasting, Inc.*, 46 R.R.2d 497 (1979). But that case involved an effort by an FM applicant to petition to deny the renewal of license of an AM station in which the petitioner had no direct interest. The Commission rejected the petitioner's assertion of standing. That case is quite clearly distinguishable from the instant case, where Hap-Hazard and Benchmark have both filed mutually exclusive applications for a single FM channel in Chatom, Alabama. The facts here more closely resemble those of *Tri-Cities Broadcasting Co.*, 3 R.R.2d 1021 (1964), where the full Commission stated that

> [i]n view of the fact that the Commission's acceptance of [one] mutually exclusive . . . application has presently foreclosed the possibility of a grant of [a second] application without hearing, we find that the latter is a "person aggrieved or whose interests are adversely affected". . . .

3 R.R.2d at 1024. It is difficult to conceive of a party with a more direct and substantial interest in a particular application than a competing applicant whose application may be summarily

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[1/] Benchmark's Opposition is dated April 25, 1991, although the transmittal letter to the Commission and the accompanying certificate of service both bear the date of April 24, 1991. Whatever might have been the correct date, no service copy of the Opposition was received by undersigned counsel until May 2, 1991. While undersigned counsel has sought diligently to prepare the instant reply, the press of his professional responsibilities has prevented him from completing this reply at an earlier date. Those responsibilities include preparation and presentation of oral argument (as counsel for appellant) in a case before the U.S. Court of Appeals for the District of Columbia Circuit on May 7, 1991; preparation of multiple pleadings in no fewer than three on-going comparative hearings; preparation of an arbitration opinion; and other client-related matters. Despite these activities, the instant Reply -- which closes out the pleading cycle herein and acceptance of which, therefore, will cause no prejudice to any party -- is being submitted within two weeks of receipt of Benchmark's Opposition. To the extent that leave must be sought for the submission of the instant Reply, such leave is hereby requested for the foregoing reasons.

rejected as a result of a grant of that other application.

3. Before addressing various substantive details of Benchmark's Opposition, Hap-Hazard notes that that Opposition, as originally filed, was not supported by any affidavit or declaration submitted under penalty of perjury. By Supplement filed on April 29, 1991, Benchmark did submit an undated Declaration of John Raymond Meyers. That Declaration stated, in relevant part

> My name is John Raymond Meyers, and I am President of Benchmark Communications Corporation, permittee of FM broadcast station WCCJ, Chatom, Alabama.

This statement is demonstrably incorrect to the extent that Mr. Meyers avers that Benchmark is the "permittee of FM broadcast station WCCJ". In fact, Benchmark is ***not*** the permittee of any such station: while it once was the permittee, its efforts to extend the permit were denied by the Commission in 1989 and the permit was cancelled. Mr. Meyers' apparent inability to keep track of such a basic fact raises questions about the validity of any other statements he might offer.

Discussion

4. Benchmark opens its substantive discussion with the defensive claim that its description (contained in its above-captioned application) of its previous problems before the Commission was "accurate and put any reader on notice of the relevant facts". Benchmark Opposition at 5. With all due respect, Benchmark appears to have a distorted notion of accuracy and candor. In fact, the verbiage in Benchmark's application appears to have been carefully designed to mislead the reader into believing that, while some allegations may have been raised against Benchmark, those allegations were never (and need not have been) addressed in any meaningful sense.

5. In fact, though, the January 19, 1989 letter from Larry Eads suggests precisely the opposite. That letter clearly indicates that the misrepresentation allegations had certainly been "reached", albeit not formally resolved, and that the explanations which Benchmark had offered appeared to be inadequate. If Benchmark truly believes that its description of its previous

problems was accurate and forthcoming, the Commission may well question the wisdom of giving Benchmark any further consideration at all.

6. In its Opposition Benchmark attempts to re-argue its case concerning its extension application which was denied in January, 1989. In so doing, however, Benchmark merely digs itself in even deeper by contradicting itself repeatedly.

A. *Transmitter Site Lease*

7. Benchmark opens with a discussion of its efforts to secure a lease of its transmitter site. According to Benchmark, this was a long process. Benchmark Opposition at 6. Apparently, Benchmark is attempting to create the impression that the lease negotiation led to some unavoidable delay which prevented Benchmark from moving forward with its construction. That impression is contradicted, however, by the fact that, in the very next section of the Opposition, Benchmark claims that it had already initiated construction at the site in January, 1988. Benchmark Opposition at 6-7. In other words, it appears that either (a) the lease negotiations were not themselves responsible for any delay; or (b) any "construction" which may have been undertaken in January, 1988 was virtually negligible because Benchmark did not, at that time, have a lease. [2/] This contradiction, however, pales in significance when compared to Benchmark's other contradictions.

B. *Acquisition of Guy Anchors*

8. Benchmark's reference to the "construction" efforts which supposedly occurred in January, 1988 is also noteworthy for the fact that Benchmark pointedly states that Mr. Meyers brought with him in January, 1988 certain guy anchors. Benchmark Opposition at 6-7.

[2/] It bears noting that Benchmark has yet to demonstrate to the Commission that it ever obtained an executed lease for its transmitter site. While Benchmark has certainly implied that it was ultimately given a lease, to the best of Hap-Hazard's knowledge no such executed lease has been filed with the Commission. Of course, in its above-captioned application, Benchmark is proposing to use a different transmitter site altogether.

Benchmark acknowledges that these guy anchors were not installed at that time. *Id.* The references to guy anchors is apparently an attempt to justify Benchmark's representation, in its March, 1988 extension application, that "anchors and tie down points" had been completed at the site as of early February, 1988. Presumably, Benchmark would have the Commission believe that that representation was essentially accurate since Mr. Meyers goes out of his way in Benchmark's Opposition to claim that he did bring "guy anchors" to the site in January, 1988.

9. But that claim is contradicted by the very "proof" which Benchmark offers in ostensible support of that claim. Attachment C-3 to Benchmark's Opposition is described by Benchmark as a copy of "the invoice for these [guy] anchors". Benchmark Opposition at 7. But even a cursory review of the invoice reveals that it is dated June 30, 1988, ***five months after*** the anchors were supposedly brought to the site. Thus, it must be concluded from Benchmark's own tendered "proof" that Mr. Meyers could ***not*** have brought the anchors to the site in January, 1988, despite Benchmark's repeated representations to the contrary. Benchmark's inability to get its story straight here is unfortunately consistent with the questions which Benchmark has already raised, *sua sponte*, about its own credibility before the Commission.

C. *Benchmark's Mobile Home*

10. Similar problems exist with respect to the supposed mobile home which Benchmark (depending on which story is to be believed) did or did not install at its site. One need only consider Benchmark's own variations on this story to recognize Benchmark's obvious incredibility. In its March 16, 1988 extension application, Benchmark stated that

> [t]he mobile home *was then* brought to the site and modifications to its interior *were started* to accommodate the studios, etc. Equipment *is being installed and tested* in those areas that are complete.

See Benchmark Opposition, Attachment E-4 (emphasis added). From the language which Benchmark itself chose to use, there can be no mistake that Benchmark was expressly and affirmatively representing to the Commission that the mobile ***had*** already been delivered and that

installation of equipment *had already begun* as of March 16, 1988, the date of the application.

11. But then, in an amendment dated May 26, 1988 -- an amendment which happened to be filed some three weeks *after* a petition to deny Benchmark's extension application was filed -- Benchmark's story changed considerably. The May, 1988 version was as follows:

> Among [the construction problems supposedly encountered by Benchmark] was the destruction of the original mobile trailer intended for use as studio and transmitter. The road into the transmitter site is best described as primative [sic]. The original trailer was damaged during the delivery attempt and although repairs were attempted, the damage was severe enough to necessitate removal and another smaller trailer was brought to the site and is now in position.

Benchmark Opposition at Attachment F-3. This version appears to indicate that the trailer was in fact delivered, but that, in reaching the site via the "primative" road, it was damaged so badly that "removal" from the site was necessary. While Benchmark's language may not have been precise, it is clear that Benchmark was trying to convince the Commission that the trailer had in fact been delivered and installed, but in an unacceptable condition which required its "removal" from the site.

12. That was Benchmark's story until August 8, 1988, when Benchmark responded to a letter of inquiry from the Chief, Audio Services Division. There Benchmark placed the following far-fetched gloss on its May, 1988 representations:

> Supposedly [the refurbishment of the mobile home] was performed and then the trailer was to be brought to the site by mid-March. Since this work was to be completed by the time of the [March, 1988] extension request and as the filing was being prepared during the first two weeks of March, it was assumed that all would be as described. However, as indicated in the exhibit of the ammended [sic] extension request on May 26, 1988, the trailer never made it to the site. Of course no equipment was installed.

Benchmark Opposition at Attachment H-3.

13. From Benchmark's own representations through August, 1988, then, it appears that Benchmark's express and explicit statements in its March, 1988 application were clearly inconsistent with the truth. Benchmark twice conceded that the mobile home -- which, according

to the March, 1988 version, had been placed at the site, and in which equipment was being installed -- had *not* been placed at the site and equipment had *not* been installed therein. Moreover, while Benchmark's August, 1988 statement that "the trailer never made it to the site" is somewhat cryptic and never explained, it appears from the May and August, 1988 statements that the mobile home at least made it part way down the "primative" road to the site, was damaged in the process, and was taken away.

14. All the twists, turns and inconsistencies in the foregoing justify, on their own, the conclusion that Benchmark is incapable of telling the truth to the Commission. But now, in its Opposition to Hap-Hazard's Petition, Benchmark offers yet another version of the mobile home story:

> Meyers believed all had gone well [with the mobile home refurbishment] until late March, when his surveyor reported the trailer had not been delivered. Meyers telephoned the seller, who said he had taken it to Chatom but could not get it into the site. However, no Benchmark representative was present during the claimed delivery attempt, and Meyers believes the seller damaged the trailer trying to move it out of Gulf Breeze.

Benchmark Opposition at 7. It should be noted that this language appears in the text of the Opposition, and thus is presumably that of counsel for Benchmark. Mr. Meyers has, as noted above, provided a blanket supporting declaration which, while it does not address any of the details to which he is supposedly attesting, must be deemed to be intended to support at least this passage (particularly to the extent that that passage expressly reflects Meyers' personal "belie[f]").

15. But this, needless to say, raises still further problems for Benchmark. It now appears that Benchmark is claiming -- contrary to its various earlier versions of the story -- that the mobile home not only did not make it anywhere near the site, but that it may not even have left Gulf Breeze. That, of course, is dramatically inconsistent with everything Benchmark has told the Commission heretofore.

16. But more importantly (at least insofar as the above-captioned application is

concerned), it further undermines Benchmark's representations in its current application. There Benchmark specifically asserts that it thought that, *inter alia*, the mobile home was supposed to be installed in March and that, when it was not, "Benchmark ***immediately*** amended the application and ***stated the nature of the discrepancies*** and the steps it took to correct them." Benchmark Application at Attachment I (emphasis added). But according to Benchmark's Opposition to Hap-Hazard's Petition, Mr. Meyers learned in "late March" that the mobile home had not been delivered. Nevertheless, even according to Benchmark no replacement mobile home was obtained and installed until some six weeks later, *see* Benchmark Opposition at Attachment H-3, and the Commission was not in any event notified that any problem at all existed with respect to the mobile home until Benchmark's May 26, 1988 amendment, ***two months*** after Benchmark's apparent discovery of the problem. Moreover, as demonstrated above, it cannot legitimately be said that Benchmark "stated the nature of [any] discrepancies" at all. And finally, it cannot be ignored that Benchmark's efforts to replace the mobile home, and its amendment to the Commission, occurred ***after*** the filing of a petition to deny Benchmark's March, 1988 extension application.

17. Thus, far from setting the record concerning the mobile home straight, Benchmark's Opposition not only under***scores*** Benchmark's own self-contradictions, but also under***mines*** the validity of one of the factual claims contained in Benchmark's current application.

D. *Benchmark's Tower*

18. Benchmark has similarly been unable to keep its story about its supposed tower straight. In its March, 1988 application, Benchmark stated expressly and explicitly that

> [t]he tower ***was delivered to the site*** March 8, and erection is scheduled to start March 23. . . .

Benchmark Opposition at Attachment E-4 (emphasis added). That seems relatively straightforward. But then, in May, 1988, the story changed as follows:

> The tower ***delivered to the site*** was not the one specified and was also incomplete. The proper tower has been located and is being shipped.

Benchmark Opposition at Attachment F-4 (emphasis added). This version was further elaborated on in Benchmark's August, 1988 response to the Commission:

> The original tower, a Utility Tower, was supposed to be ***delivered to the site*** on March 8, 1988. However as was indicated in the ammended [sic] application on May 26, 1988, ***the tower delivered*** was a 160 foot communications tower so delivery was refused. . . .
>
> . . . The [incorrect] tower actually arrived on the 14th of March. I was not informed of the problem until March 21st, when I returned to Miami from Melbourne, Florida.

Benchmark Opposition at Attachment H-5 (emphasis added).

19. Obviously, Benchmark has thus acknowledged that its original version of the story was completely inaccurate: contrary to the explicit, unequivocal assertion that the tower had in fact been delivered to the site on March 8 (and the implicit assertion that that tower was the correct one), it turns out that no tower at all had been delivered to the site until March 14, and then that tower had been rejected. But in its Opposition, Benchmark adds yet another twist. Now according to Benchmark:

> [Mr. Meyers] inspected the tower [which Benchmark supposedly ordered prior to March, 1988] at that time [*i.e.*,early January, 1988] and arranged to have it shipped to Chatom the first week in March 1988. When he visited the seller again the week of March 14-20, Meyers found that the tower had indeed been shipped. However, upon his return to Miami, Meyers learned on March 21 that a different tower (only 160 feet tall) had somehow been shipped, and to Miami instead of Chatom, and that delivery had been refused on March 14.

Benchmark Opposition at 8. Now it appears that Benchmark would have the Commission believe that no tower at all was ever delivered to the site in March, 1988! Instead, it appears that Benchmark is saying that the supposedly incorrect tower was delivered to Miami. [3/]

[3/] Benchmark offers no documentation relative to the supposed delivery, and refusal, of this supposedly incorrect tower. That lack is noteworthy because Benchmark has gone to great lengths in other respects to offer various shreds of documentary (albeit not especially probative) evidence -- such as credit card slips, (continued...)

20. That variation, however, raises additional questions. Why was it shipped to Miami, if Mr. Meyers himself had personally "arranged to have it shipped to Chatom", Benchmark Opposition at 8? Who was it shipped to? Who refused to accept delivery? If Mr. Meyers was away from Miami when the delivery occurred, on whose authority and on what basis was it refused? How could Mr. Meyers ***not*** have been aware of the refusal until a week later? [4/] Why did Benchmark state -- expressly, explicitly and unequivocally -- in ***both*** its March, 1988 application and its May, 1988 amendment (which was supposed to correct the original misstatements) that the tower had in fact been "delivered to the site"? Why did Benchmark, in its August, 1988, fail to clarify this point, instead leaving the clear implication that a tower had in fact been "delivered to the site"? Obviously, Benchmark cannot be said to have been forthright and candid in ***any*** respect here. [5/]

21. Moreover, as was the case with the mobile home, Benchmark's latter-day disclosures are inconsistent with its representations in the above-captioned application. Again, Benchmark claimed in the application that it had "immediately" amended its March, 1988 application to

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[3/](...continued)
incidental receipts and the like -- in support of its various claims. One would have thought that the delivery of a 160-foot tower, and the refusal of that delivery, would have generated some paperwork which Benchmark would have retained for its records and which would have found its way into one or another of Benchmark's various submissions to the Commission. While not absolutely conclusive, Benchmark's failure to offer any independent support for its claims concerning its original tower strongly suggests that those claims are not credible.

[4/] It must be recalled that during the week of March 14-20, *i.e.*, immediately after the tower was refused, Mr. Meyers was supposedly meeting with the company which shipped the tower. Thus, even if Mr. Meyers was not aware of the refusal, it is likely, if not certain, that the shipper was aware of it.

[5/] Although arguably immaterial to the precise question before the Commission, Benchmark's subsequent representations concerning its "acquisition" of yet a *third* tower certainly do nothing to allay concerns about Benchmark's credibility. Despite the fact that, in its May, 1988, amendment, Benchmark stressed that it had finally located a replacement tower and had arranged for installation (which, according to Benchmark, could be completed in "three to four days", Benchmark Opposition at Attachment F-4), in August, 1988, Benchmark suddenly mentioned that it had since acquired yet another tower which, far from being installed, was still in storage in Miami. This raises a question as to the validity of Benchmark's May, 1988 claims: was the tower described in that amendment in fact acquired, or was that showing merely concocted to provide Benchmark something to tell the Commission?

correct misstatements therein. But, while Benchmark knew that no tower was in place at the Chatom site as of March 21, 1988, its supposedly "immediate" corrective amendment was not filed until ***two months*** later, and only ***after*** a petition to deny had raised questions about Benchmark's application.

E. *Power Supply*

22. Although Benchmark addresses the question of power supply only in passing in its Opposition, the materials on which that Opposition are based (and which are attached to the Opposition) demonstrate that Benchmark's representations concerning the availability of power have been as incredible as the rest of Benchmark's claims. In its March, 1988 application, Benchmark stated -- expressly, explicitly and unequivocally -- that

> [t]he local power company has also been installing a service line to the site and should be completed by the end of March.

Benchmark Opposition at Attachment E-4.

23. In view of the wholesale untruthfulness of the rest of Benchmark's representations in the March, 1988 application, it is not surprising to find that that statement, too, was untrue. In its May, 1988 amendment, Benchmark addressed the question of power as follows:

> The next problem to arrise [sic] has been the delay of the local power company to deliver power to the site. Local weather conditions have pulled their limited crews away from our requirements to restore existing service knocked out by various storms that come trhrough [sic] the area about once a week. In addition there has been a right-of-way question for utility easements that has held up the installation of a pole line.

Benchmark Opposition at Attachment F-4. Thus, while Benchmark used the otherwise unsupported claim of weather conditions to explain why, despite its earlier representation (*i.e.*, that power installation was already underway), power installation had not been completed, Benchmark at least acknowledged that a "right-of-way question" existed.

24. It was not, however, until the August, 1988 response that the precise nature of that "right-of-way question" surfaced. In that response Benchmark included a copy of a document

which it described as

> the agreement finally reached with the land owners giving the utility easement rights to permit the local power company to proceed. The local power company would not write a service order until this agreement had been acquired and presented to them. As you can see, the date is July 19, 1988 and July 27, 1988.

Benchmark Opposition at Attachment H-6. In other words, Benchmark's earlier claims that (a) power installation had started and (b) power installation had been interrupted by weather conditions were absolutely false. What was true was that Benchmark had not obtained the necessary easement rights. Certainly the vague and obfuscatory reference to some possible "right-of-way question" was misleading.

25. But even more misleading was Benchmark's suggestion, quoted in the preceding paragraph, above, that some agreement had been reached the land owner. As is apparent from the quoted passage, Benchmark represented that some such agreement had been reached on "July 19, 1988 and July 27, 1988". But a review of the documents which Benchmark tendered to the Commission in support of that claim does not support it. *See* Benchmark Opposition at Attachment H-13-17.

26. Those documents appear to reflect, instead, that local Alabama counsel, apparently acting on behalf of Benchmark, had prepared an easement form for presentation to the land owner; local counsel had also drafted a cover letter, dated July 19, to accompany that easement form. By separate letter dated July 27, 1988, to an individual who appears to be a Benchmark representative, local counsel forwarded both the easement form and his July 19 cover letter. According to local counsel's July 27 letter, the easement form and cover letter were to be forwarded to the land owner, together with a check for $630.00 which, apparently, was to be provided by Benchmark. Contrary to the clear implication of Benchmark's August, 1988 statements to the Commission, however, there is absolutely no evidence whatsoever that the easement form, local counsel's cover letter and the check were ever forwarded to the land owner,

and there is even less evidence that the land owner signed the form. Indeed, as was pointed out in the Commission's letter of January, 1989, denying Benchmark's extension application, no power lines had been laid of that date, a fact which strongly suggests that, contrary to Benchmark's claim, no easement was ever obtained.

27. And, sure enough, Benchmark effectively concedes that point in its Opposition to Hap-Hazard's Petition. Addressing the question of power, Benchmark states that

> initial problems in securing electric power at the WCCJ site have long since been resolved. Once Benchmark discovered that its access easement was not sufficient for installation of electric power poles and lines, it promptly made the necessary arrangements. That process would have continued to completion but for the Commission's June 9, 1988 rescission of its grant of a permit extension.

Benchmark Opposition at 9. Here Benchmark seems to be saying that it promptly took care of the easement question -- that it "made the necessary arrangements" -- before June 9, 1988, and that its efforts to install power were interrupted by the June, 1988 rescission of its permit. But as demonstrated above, it is clear from Benchmark's own documentary submissions that Benchmark was at least aware of some "right-of-way question" as early as May, 1988, and that as of July 27, 1988, Benchmark ***still*** had not resolved the problem.

F. *Other Matters*

28. Benchmark also attempts to claim that it has much if not all necessary equipment on hand. The trouble with that claim is that it does not help Benchmark in any meaningful way. Even if Benchmark does have all the equipment which it originally proposed to use for the Chatom station, the fact remains that Benchmark's above-captioned application specifies a vastly different set of facilities, including different power and a directional antenna. Thus, even if Benchmark had acquired all the necessary equipment for its former, since-cancelled permit [6/], that

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[6/] Hap-Hazard does not concede that Benchmark's representations concerning its equipment acquisition are any more accurate than any of its other representations. Indeed, even in its Opposition to Hap-Hazard's Petition, Benchmark seems to be sliding off the representations it made in its earlier applications concerning (continued...)

has absolutely no impact on the grantability of its current application. Moreover, the facilities which Benchmark now proposes would substantially increase its construction costs -- and yet, there is no indication that Benchmark has considered this factor in any serious way. 7/

Conclusion

29. Benchmark's track record before the Commission is shocking on a number of levels. It is shocking that Benchmark would make the bald-faced misrepresentations which it made in its March, 1988 application. It is further shocking that Benchmark would then concede those misrepresentations in its May, 1988 amendment, and then make further misstatements which it would then concede in its August, 1988 response. And it is simply incredible that, in response to Hap-Hazard's Petition, Benchmark would submit an Opposition which strongly demonstrates that, even after all of its previous tries, Benchmark ***still*** has not given the Commission the straight story. These considerations alone are sufficient to warrant the summary rejection of Benchmark's application. 8/

6/(...continued)
equipment. *See* Benchmark Opposition at 8, ¶24 (where Benchmark's expectations concerning equipment, as described in Benchmark's August, 1988 response to the Commission, are contradicted).

7/ With reference to Benchmark's now-proposed facilities, it should also be pointed out that Benchmark is proposing a new transmitter site. Thus, all of the discussion concerning the supposed current state of preparedness of its originally authorized site is generally irrelevant to its above-captioned application. Of course, however, if Benchmark's dilatory approach to preparation of that original site is any indication, the Commission cannot expect any better performance at some alternate site.

8/ In light of the documentary record already provided by Benchmark to the Commission, there is no serious "material and substantial question of fact" concerning Benchmark's qualifications: it is clear, and conceded by Benchmark, that Benchmark made affirmative misrepresentations in its March, 1988 application. Thus, no hearing would be necessary prior to rejection of Benchmark's application. Nevertheless, even before the Commission were to reach that ultimate grantability question, Benchmark's application could be dismissed as unacceptable for filing for the reasons set forth in Hap-Hazard's Petition at 5-7. As discussed therein, Benchmark's application, by Benchmark's own admission, seeks modification of a construction permit which has been cancelled. Thus, it may be dismissed summarily.

While Benchmark attempts to argue that its characterization of the application was merely an effort to "protect its rights", Benchmark Opposition at 4, the fact of the matter is that Benchmark had ample mechanisms by which to "protect its rights" without attempting the nifty (but unsuccessful) pirouette it attempted in its application. For example, if Benchmark believed (as it suggests in its Opposition at 4) that the Policy and Rules staff had erred in some manner in its channel allotment decision, Benchmark could have
(continued...)

30. But in addition, there is the more practical, more overriding concern for the audience of Chatom, Alabama. While they have had an FM channel allotted for some seven years already, they have yet to receive any local service from that channel because Benchmark failed to construct the station which the Commission authorized it to. And, as is patently obvious from the available record, Benchmark's failure in that respect is attributable exclusively to Benchmark itself. It would add insult to injury to Chatom and its residents to give Benchmark a further opportunity to warehouse the Chatom channel. Six years is long enough -- Benchmark had its chance, Benchmark elected not to take advantage of that chance (and, in so doing, Benchmark unquestionably demonstrated itself to be unqualified to be a Commission licensee), and now Benchmark must step aside to permit other willing and qualified applicants to do what Benchmark has been incapable of doing: building and operating a station in Chatom. Benchmark's application must be dismissed or denied.

Respectfully submitted,

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May 13, 1991

8/(...continued)
filed a petition for reconsideration aimed at correcting the error. Since such a petition might have resulted in a stay of the effectiveness of the rule making action, *see* Section 1.420(f), Benchmark could have accomplished what it appears to have wanted, *i.e.*, a delay in the channel allotment pending resolution of its then-pending petition for reconsideration. For whatever reason, Benchmark elected not to take that approach. Having foregone available and appropriate means of achieving its stated goal, Benchmark should not be allowed to resort to extraordinary "self-help" measures which work to the detriment of *bona fide* applicants such as Hap-Hazard.

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that, on this 13th day of May, 1991, I caused to be placed in the U.S. mail, first class postage prepaid, copies of the foregoing "Reply to Opposition to Petition to Deny" addressed to the following:

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